TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 570.

WALTER S. HALLANAN, STATE TAX COMMISSIONER, AND E. T. ENGLAND, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, PETITIONERS,

vs.

UNITED FUEL GAS COMPANY, A CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED AUGUST 31, 1922.

(29,120)

(29,120)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 570.

WALTER S. HALLANAN, STATE TAX COMMISSIONER, AND E. T. ENGLAND, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, PETITIONERS,

vs.

UNITED FUEL GAS COMPANY, A CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

INDEX.

	Original.	Print.
Record from the supreme court of appeals of the State of West Virginia	1	1
Caption	1	1
Mandate from U. S. Supreme Court	1	1
Final order	3	3
Clerk's certificate	4	3

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 7, 1922.

Pleas Before the Supreme Court of Appeals of the State of West Virginia.

At a Regular Term of the Supreme Court of Appeals, held at harleston, Kanawha County, from the 11th day of January, 1922, o the 3rd day of June, 1922, both inclusive, the following order was ade and entered during said term on the 30th day of May, 1922, o wit:

Absent: Judge Lively.

4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,

vs.

ALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.

pon an Appeal from a Decree of the Circuit Court of Kanawha County, Pronounced on the 14th Day of September, 1920.

The mandate of the Supreme Court of the United States in the se lately pending therein, entitled United Fuel Gas Company vs. alter S. Hallanan, State Tax Commissioner, et al., having been resented to the Court on the 6th day of February, 1922, it is now rdered that the same be recorded in the Order Book of this Court. The said mandate is in words and figures as follows:

[SEAL.]

he President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Whereas, lately in the Supreme Court of Appeals of the State of est Virginia, before you, or some of you, in a cause between Walter Hallanan, State Tax Commissioner etc., et al., appellants and nited Fuel Gas Company, appellee, No. 4201, wherein the judgent of the said Supreme Court of Appeals, entered in said cause n the 26th day of November, A. D., 1920, is in the following ords, viz:

"The Court, having maturely considered the motion to reverse the decree aforesaid, the record thereof and the arguments of counsel thereon, is of opinion to, and for reasons ated in writing and filed with the record, and hereby doth, sustain id motion as to part of said decree and overrule said motion as to e remainder thereof. It is therefore adjudged, ordered and deeed that the decree of the Circuit Court of Kanawha County, ronounced in this cause on the 14th day of September, 1920, in so r, and in so far only, as it decrees and holds the Transportation ct, mentioned and described in the bill and proceedings in this

cause, being chapter 5 (House Bill No. 3) of the Acts of the Legislature of the State of West Virginia, extraordinary session held in 1919, to be void and perpetually inhibits, enjoins and restrains the appellants from enforcing or attempting to force against the appellee, in any manner or respect, the provisions of said act in so far as the same apply to intrastate commerce as defined by the written opinion filed herein, be and the same hereby is set aside, reversed and annulled, and that in all other respects said decree be and the same hereby is affirmed, and that the appellee do pay to the appellants their costs about the prosecution of their appeal in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County," as by the inspection of the transcript of the record of the said Supreme Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears,

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the Judgment of the said Supreme Court of Appeals in this cause be, and the same is hereby, reversed with costs;

and that the said appellee, United Fuel Gas Company, re-
3 cover against the said appellants Four Hundred and forty-nine dollars and seventy-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court of Appeals for further proceedings not inconsistent with the opinion of this Court. December 12, 1921.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of Appeals of the State of West Virginia, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, and fourth day of February, in the year of our Lord one thousand nine hundred and twenty-two.

Costs of appellee:

Clerk	$140.15
Printing Record	289.60
Attorney	20.00
	$449.75

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

And the Court takes time to consider of the final order to — entered in this cause.

At another day, to wit, on the 2nd day of June, 1922, and during the regular term of said Court as aforesaid, the following order was made and entered in this cause:

Absent: Judge Lively.

4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,

vs.

WALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.

Upon an Appeal from a Decree of the Circuit Court of Kanawha County, Pronounced on the 14th Day of September, 1920.

The Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this cause and the record of the decree aforesaid, is of opinion that there is no error in said decree. It is therefore adjudged, ordered
4 and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 14th day of September, 1920, be and the same hereby is affirmed, and that the appellants do pay to the appellee thirty dollars damages and its costs about its defense in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County.

STATE OF WEST VIRGINIA:

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, do hereby certify that the foregoing is a true copy of all of the record and proceedings in the therein entitled cause since the receipt of the mandate of the Supreme Court of the United States as the same remains upon the records and files of the said Supreme Court of Appeals, and that no written opinion was filed in connection with the foregoing orders.

In testimony whereof, I hereto set my hand and affix the seal of the said Supreme Court of Appeals of West Virginia, at Charleston, Kanawha County, this 18th day of August, 1922, and in the 60th year of the State.

[Seal of the Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals,
By R. A. POFFENBARGER,
Deputy Clerk.

5 [Endorsed:] In the Supreme Court of the United States. Walter S. Hallanan and E. T. England vs. United Fuel Gas Company. Record.

Endorsed on cover: File No. 29,120. West Virginia Supreme Court of Appeals. Term No. 570. Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General of the State of West Virginia, petitioners, vs. United Fuel Gas Company, a Corporation. Petition for writ of certiorari and exhibit thereto. Filed August 31, 1922. File No. 29,120.

No. 570

OCTOBER TERM 1927

IN THE

Supreme Court of the United States

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia, and E. T. ENGLAND, Attorney General of the State of West Virginia,

Petitioners,

against

UNITED FUEL GAS COMPANY, a corporation,

Respondent.

MOTION FOR WRIT OF CERTIORARI AND NOTICE OF MOTION.

E. T. England, *Attorney General of West Virginia,*

S. B. Avis,

William G. Matthews,

Fred C. Blue,

Counsel for Petitioners,

Charleston, West Virginia.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia and E. T. ENGLAND, Attorney General of the State of West Virginia, Petitioners, AGAINST UNITED FUEL GAS COMPANY, a corporation. Respondent.	No. 570.

MOTION FOR WRIT OF CERTIORARI.

And now come the petitioners above named by E. T. England, Attorney General of the State of West Virginia, S. B. Avis, William G. Mathews and Fred O. Blue, their counsel, and move this court, upon the petition of Walter S. Hallanan, State Tax Commissioner of the State of West Virginia and E. T. England, Attorney General of the State of West Virginia, petitioners, sworn to on the 31st day of August, 1922, a certified copy of the entire transcript of the record in this cause, including the proceedings in the Supreme Court of Appeals of the State of West Virginia since the mandate of this Honorable Court, dated the 4th day of February, 1922, and the petitioners' brief therewith, filed on the 31st day of August, 1922, for a Writ of Certiorari, to be directed to the Supreme Court of Appeals of the State of West Virginia to review the final decree and judgment of said court rendered in the cause of United Fuel Gas Company, a corporation, against said petitioners on the 2nd day of June, 1922,

to the end that said final decree and judgment of said Supreme Court of Appeals of West Virginia, in so far as it denied said petitioners, as the agents and representatives of the State of West Virginia, the right to levy and collect the tax of one-third of one cent for each thousand cubic feet of 11,358,837 M. cubic feet of natural gas transported within the State of West Virginia for the period in question, amounting to and involving $37,962.79, should be set aside, reversed and annulled and that such further proceedings in said cause shall be had as to justice shall appertain.

E. T. England, *Attorney General of West Virginia,*

S. B. Avis,

William G. Mathews,

Fred O. Blue,

Counsel for Petitioners,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia and E. T. ENGLAND, Attorney General of the State of West Virginia, Petitioners, AGAINST UNITED FUEL GAS COMPANY, a corporation. Respondent.	No. 570.

Dear Sirs:

Please take notice, that upon the petition of Walter S. Hallanan, State Tax Commissioner of the State of West Virginia and E. T. England, Attorney General of the State of West Virginia, a certified copy of the entire transcript of the record in this cause, including the proceedings in the Supreme Court of Appeals of the State of West Virginia since the mandate of the Supreme Court of the United States, dated the 4th day of February, 1922, and the petitioners' brief therewith, filed on the 31st day of August, 1922, we shall move the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, 2nd day of October, 1922, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move for such further relief in the premises as may be just.

Dated Charleston, West Virginia, September 11, 1922.

E. T. England, *Attorney General*
of West Virginia,
S. B. Avis,
William G. Mathews,
Fred O. Blue,
Counsel for Petitioners,
Charleston, West Virginia.

To:
Malcolm Jackson,
R. G. Altizer,
Charleston, West Virginia.
Counsel for United Fuel Gas Company,
a corporation, Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 570.

WALTER S. HALLANAN, STATE TAX COMMISSIONER, AND E. T. ENGLAND, ATTORNEY GENERAL, OF THE STATE OF WEST VIRGINIA, PETITIONERS,

vs.

UNITED FUEL GAS COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

To the Honorable William H. Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners, Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, of the State of West Virginia, respectfully show that they are aggrieved

by a final decree of the Supreme Court of Appeals of the State of West Virginia in a suit in equity brought by said United Fuel Gas Company, as plaintiff, against your petitioners, which final decree was made and entered by said Supreme Court of Appeals of West Virginia at its January term, 1922, to wit, on the 2d day of June, 1922, by which said final decree said Supreme Court of Appeals of West Virginia failed and refused to give due effect to, and to carry into execution, the mandate of this honorable court in said cause, in conformity to the opinion and judgment of this honorable court, which mandate was dated the 4th day of February, 1922, and which decision and order of this honorable court was made and entered on the 12th day of December, 1921.

Your petitioners further represent that they made application by their attorneys to the said Supreme Court of Appeals of West Virginia to execute the mandate aforesaid in conformity with the judgment and decree and the opinion of this honorable court.

Statement and the General Reasons Relied on for the Allowance of a Writ of Certiorari.

On the 26th day of November, 1920, a decree was made and entered by the Supreme Court of Appeals of West Virginia (that being the highest court of that State) affirming in part and reversing in part a decree made and entered by the Circuit Court of Kanawha County, West Virginia, on the 14th day of September, 1920, in a suit in equity wherein your petitioners were defendants and United Fuel Gas Company was plaintiff, which decree first named was made absolute and final by an order of said Supreme Court of Appeals of West Virginia entered January 12, 1921.

A writ of error directed to the said Supreme Court of Appeals of West Virginia to review its said final decree was duly allowed and awarded by this honorable court upon a petition filed by the respondent. The cause came on to be heard by this honorable court and was argued on the 9th and 10th days of November, 1921, and was decided on the 12th day of December, 1921. This honorable court reversed said last-mentioned final decree of the Supreme Court of Appeals of West Virginia, and the cause was remanded to said Supreme Court of Appeals of West Virginia for further proceedings not inconsistent with the opinion of this honorable court.

For reasons given by this honorable court in The Eureka Pipe Line Company against your petitioners and decided by this honorable court on said 12th day of December, 1921, the writ of error was entertained and reference made to the fact that the case of The Eureka Pipe Line Company against your petitioners and this cause were heard together and disposed of in a single opinion by the said Supreme Court of Appeals.

The bill in the original suit was to prevent the enforcement against United Fuel Gas Company of a statute of West Virginia (Acts of 1919, extraordinary session, chap. 5) that forbids engaging in the business of transporting natural gas in pipe lines without the payment of a tax of one-third of one cent for each thousand cubic feet of gas transported. The said Circuit Court of Kanawha County held that the statute was void.

It was decided by the said Supreme Court of Appeals, when said cause was originally before it, that the act, chapter 5 of the Acts of the Legislature of West Virginia, extraor-

dinary session, 1919, imposing a tax upon the business of engaging in the transportation of oil and gas by pipe lines, in question was valid as to intrastate business, as defined in the opinion, and that the tax, one-third of one cent for each thousand cubic feet of natural gas transported, could be levied on quantities aggregating 34,157,952 M cubic feet of natural gas transported for the period in question, in intrastate commerce, as defined in the opinion of said Supreme Court of Appeals. Of said quantity of 34,157,952 M cubic feet of natural gas, 7,567,353 M cubic feet was sold to the Columbia Gas and Electric Company; 7,961,333 M cubic feet to the Hope Natural Gas Company, and 7,270,429 M cubic feet to the Pittsburgh West Virginia Company. And it was held by this honorable court that the gas so sold to said three companies was interstate commerce and not intrastate commerce, as held by said Supreme Court of Appeals.

In the opinion of this honorable court, it was said:

> "That the necessities of business requiring a much smaller amount destined to points within the State to be carried undistinguished in the same pipes, does not affect the character of the major transportation."

The said final order of said Supreme Court of Appeals made and entered on the 2d day of June, 1922, in effect denies to the State of West Virginia the right to levy and collect the tax on 11,358,837 M cubic feet of natural gas transported in intrastate commerce for the period in question, which amounts to and involves $37,862.79, which is the amount in dispute for the period in question, and restrains your petitioners, as the agents and representatives of the State of West Virginia, from levying and collecting said tax for said period.

Your petitioners are further advised and represent that said final order of said Supreme Court of Appeals made and entered on the 2d day of June, 1922, denied to them, as the agents and representatives of the State of West Virginia, a right or privilege especially set up and claimed under an authority exercised under the United States, contrary to the provisions of section 237 of the Judicial Code, as amended by the act of September 6, 1916.

Your petitioners further represent that all of said questions were before your honorable court in said cause and were disposed of by its judgment, decree, and opinion, and said Supreme Court of Appeals had no right to vary said judgment and decree upon any matter decided by this honorable court or to intermeddle with it further than to settle so much as was remanded, and had no right to question matters to which it had not been reversed.

Your petitioners are advised that the effect of said judgment, decree, and opinion of this honorable court was to affirm so much of the decree of the said Supreme Court of Appeals of West Virginia as permitted and authorized your petitioners, as the agents and representatives of the State of West Virginia, to levy and collect the tax in question on said 11,358,837 M cubic feet of natural gas, or a total sum of $37,862.79.

Your petitioners present herewith as an exhibit to and part of this petition a certified copy of the entire transcript of record of the case, including the proceedings in the said Supreme Court of Appeals of West Virginia subsequent to the said mandate of this honorable court, and make the same a part of this petition.

Your petitioners, therefore, respectfully pray that a writ of certiorari be issued out of and under the seal of this

honorable court, directed to the Supreme Court of Appeals of West Virginia, commanding said court to certify and send to this honorable court on a day certain, to be therein designated, a full and complete transcript of the record and of all proceedings of said Supreme Court of Appeals of West Virginia in said cause subsequent to said mandate, which was entitled in that court, to the end that said cause may be reviewed and determined by this honorable court, as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate, and that said final decree of the said Supreme Court of Appeals of West Virginia made and entered on the 2d day of June, 1922, should be set aside, reversed, annulled, and modified, and that such further proceedings in said cause shall be had as to justice shall appertain.

And your petitioners will ever pray, etc.

Dated August 31, 1922.

WALTER S. HALLANAN,
State Tax Commissioner of the State of West Virginia,
E. T. ENGLAND,
Attorney General of the State of West Virginia,
By COUNSEL.

E. T. ENGLAND,
Attorney General of West Virginia.
S. B. AVIS,
WM. G. MATHEWS,
FRED O. BLUE,
Counsel.

DISTRICT OF COLUMBIA, *ss:*

S. B. AVIS, being duly sworn, says that he is one of counsel for Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, the petitioners herein; that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

S. B. AVIS.

Sworn to and subscribed before me this 31st day of August, A. D. 1922.

[Seal of Earl W. Cooper, Notary Public, District of Columbia.]

EARL W. COOPER,
Notary Public in and for the District of Columbia.

My commission expires Dec. 12, 1924.

I hereby certify that I have examined the foregoing petition, and, in my opinion, the petition is well founded, and that this cause is one in which the prayer of the petitioners should be granted by the Supreme Court of the United States.

Dated August 31, 1922.

FRED O. BLUE,
Of Counsel for Petitioners.

[Endorsed:] In the Supreme Court of the United States. Walter S. Hallanan and E. T. England *vs.* United Fuel Gas Company. Petition for writ of certiorari.

IN THE SUPREME COURT OF THE UNITED STATES.

WALTER S. HALLANAN, *State Tax Commissioner,* and E. T. ENGLAND, *Attorney General, of the State of West Virginia, Petitioners,*

vs.

UNITED FUEL GAS COMPANY, *a Corporation, Respondent.*

BRIEF OF WALTER S. HALLANAN, STATE TAX COMMISSIONER, AND E. T. ENGLAND, ATTORNEY GENERAL, OF THE STATE OF WEST VIRGINIA, IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI.

The mandate is the law of the case, and the Supreme Court of Appeals of West Virginia had no right to vary the judgment and decree of the Supreme Court of the United States upon any matter decided on writ of error; had no right to intermeddle with it further than to settle so much as was remanded, and they were bound to proceed and dispose of the case in conformity to the opinion of the Supreme Court of the United States.

We submit that the final decree of the Supreme Court of Appeals of West Virginia, made and entered on the 2d day of June, 1922, in effect evades the directions given by this honorable court and practically reverses the judgment and decree which the mandate directed them to execute.

The subordinate court is bound to proceed in such an event and dispose of the case as directed, and they have no

power *either to evade or reverse* the judgment of the Supreme Court of the United States, as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect.

In *Sibbald v. United States,* 12 Pet., 488; 9 L. Ed., 1167, the Supreme Court of the United States held:

> "When the Supreme Court have executed their power in a case before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but will send a special mandate to the court below to award it. Whatever was before the court and is disposed of, is considered finally settled. The inferior court is bound by the decree, as the law of the case; and must carry it into execution according to the mandate; they can examine it for no other purpose than execution, or give any other or further relief; or review it upon any matter decided on appeal, for error apparent; or intermeddle with it further than to settle so much as has been remanded.
>
> "After a mandate, no rehearing will be granted, and on a subsequent appeal, nothing is brought up but the proceedings subsequent to the mandate.
>
> "If the special mandate directed by the 24th section of the Judiciary Act is not obeyed, then the general power given to 'all the courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law,' by the 14th section of the Judiciary Act, fairly arises; and a *mandamus* or other appropriate writ will go." (Italics ours.)

In *Gaines v. Caldwell,* 148 U. S., 228; 37 L. Ed., 432, the court held that *where the lower court is reversed in part*

only and the cause remanded for further proceedings in regard to specified facts, the lower court is confined to such facts, and cannot question matters as to which it had been reversed, and that the lower court may consider any matters left open by the mandate; *but where the merits of the case have been acted upon in the appellate court the lower court cannot reconsider them.*

In the opinion in *Gaines v. Caldwell, supra,* the court, at pages 239, 240, said:

> "Obeying the mandate of this court and proceeding in conformity with its opinion, in the present case, were not matters within the discretion of the circuit court; and, therefore, the cases which hold that this court will not direct in what manner the discretion of an inferior tribunal shall be exercised do not apply to the present case. The opinion of this court proceeded distinctly upon an approval by it of the action of the circuit court in respect to the title and the possession, and a disapproval only of the method of accounting. * * *
>
> "It is contended for the respondent that the decree of this court was one absolutely reversing the decree of the circuit court; that the circuit court had a right, therefore, to proceed in the case, in the language of the mandate, not merely 'in conformity with the opinion and decree of this court,' but also 'according to right and justice;' and that, therefore, it had authority to permit the defendant Rugg to take further testimony in support of his exceptions, 'by way of defense to the title to the lands in controversy,' and to set down the cause 'upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;' in other words, that the whole controversy was to be reopened as if it had never been

passed upon by this court as to the title and possession of the land. This cannot be allowed, and is not in accordance with the opinion and mandate of this court."

In *West v. Brashear,* 14 Pet., 51, 54; 10 L. Ed., 350, 351, the court said:

> "There has been some discussion at the bar as to the principles by which a circuit court of the United States is to be governed when executing a mandate from the Supreme Court. Undoubtedly, the mandate must be its guide. *It is the judgment of this court transmitted to the circuit court.* And when the direction contained in the mandate is precise and unambiguous, *it is the duty of the circuit court to carry it into execution, and not to look elsewhere for authority to change its meaning.*" (Italics ours.)

In delivering the opinion of the court, *Macgwire v. Tyler,* 17 Wall., 253; 21 L. Ed., 576, Mr. *Justice* Clifford said:

> "By the directions of the mandate they were as much bound to proceed and dispose of the case *in conformity to the opinion of this court* as to reverse their former decree. But instead of that *they entered a new decree dismissing the petition, which in effect evades the directions given by this court and practically reverses the judgment and decree which the mandate directed them to execute.* Argument, to show that a subordinate court is bound to proceed in such an event and dispose of the case as directed *and that they have no power either to evade or reverse the judgment of this court, is unnecessary, as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial* power conferred by the Constitution into effect." (Italics ours.)

Mr. *Justice* Clifford further said:

> "And it is clear that it is not competent even for this court, after the term expired, to review and reverse such a decree."

Mr. *Justice* Clifford also said:

> "On receipt of a mandate it is the duty of the subordinate court to carry it into execution even though the jurisdiction do not appear in the pleadings." (Citing numerous cases.)

Mr. *Justice* Clifford further stated:

> "Judging from the proceedings of the State court under the former mandate and the reasons assigned by the court for their judicial action in the case, it seems to be quite clear that it would be useless to remand the cause a second time as the court has virtually decided that they cannot, in their view of the law, carry into effect the directions of this court as given in the mandate. Such being the fact, the duty of this court is plain and not without an established precedent. * * * Suffice it to say the rule is there settled, that where the cause has once before been remanded and the State court declines or refuses to carry into effect the mandate of the Supreme Court, the court will proceed to a final decision of the same and award execution to the prevailing party."

In a note to 8 Enc. U. S. Supreme Court Reports, at pages 130-131, the law in this connection is stated as follows:

> "No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, *for errors of fact or law,* after the term in which they have been rendered, unless for clerical mistakes (Cameron *v.* M'Roberts, 3 Wheat., 591; 4 L. Ed., 467; Bank *v.*

Wistar, 3 Pet., 431; 7 L. Ed., 731; Sibbald *v.* United States, 12 Pet., 488; 9 L. Ed., 1167) or to reinstate a cause dismissed by mistake (The *Palmyra,* 12 Wheat., 1, 10; 6 L. Ed., 531), from which it follows, that no change or modification can be made, which may substantially vary or affect it in any material thing * * * Whatever was before the court, and it disposed of, is considered as finally settled. *The inferior court is bound by the decree as the law of the case;* and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. After a mandate, no rehearing will be granted, and on a subsequent appeal, nothing is brought up, but the proceeding subsequent to the mandate. Himely *v.* Rose, 5 Cranch, 313; 3 L. Ed., 111; Browder *v.* McArthur, 7 Wheat., 58, 59; 5 L. Ed., 397; The *Santa Maria,* 10 Wheat., 431, 443; 6 L. Ed., 359; Illinois *v.* Illinois Cent. R. Co., 184 U. S., 77, 91; 46 L. Ed., 440. See also, Phillips *v.* Negley, 117 U. S., 665, 674; 29 L. Ed., 1013."

In *Durant v. Starrow,* 101 U. S., 555; 25 L. Ed., 961, it s held:

"On a mandate from this court affirming a decree, the circuit court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. Our judgment by a divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below. After the appeal was taken, the power of the court below over its own decree was

> gone. All it could do after that was to obey our mandate when it was sent down. We affirmed its decree and ordered execution. We might have ordered a modification so as to declare that the dismissal should be without prejudice. We did not do so. The circuit court had no power after that to do what we might have done and did not do."

The decision of the Supreme Court of Appeals of West Virginia in this case was made and rendered on November 26, 1920. That term has long since ended. The order here complained of was entered by the Supreme Court of Appeals of West Virginia at the January term, 1922, to wit, on the 2d day of June, 1922. The decision of your honorable court in this case was made and rendered at the October term, 1921, and the mandate was sent down on the 4th day of February, 1922.

In the opinion of this honorable court it was held that the tax in question may be levied in respect of the oil and gas used in West Virginia.

We submit that the legal character and effect of the decision of this honorable court were henceforth *res adjudicata* and not further open for question or reconsideration by the Supreme Court of Appeals of West Virginia or even by this honorable court.

In *Holleran v. Meisel,* 91 Va., 143, 148; 21 S. E., 659, the cases are collected and cited to show the following proposition of law:

> "When this court has construed the legal character and effect of certified copies of entries in certain public records, which involves the construction of the records themselves, *such construction is res adjudicata in this court and all the courts of this State.*"

In delivering the opinion in this case, Reily, *J.*, said:

> "When such decision was made and certified to the circuit court, *the legal character and effect of said entry or memorandum was henceforth res adjudicata and not further open for question or reconsideration by the circuit court, or even by this court.* We think that the construction thus placed on it was correct; but whether correct or not *it is to that extent the law of this case. It was the mandate of this court to the lower court,* and the paper or entry was henceforth not to be treated as a grant or patent. This is well settled by the decisions of this court, and of other courts of highest authority." (Citing a large number of cases, including *Tyler v. Macgwire, supra,* and *West v. Brashear, supra.*) (Italics ours.)
>
> "Where a decree after an accounting was 'reversed, and the case remanded with instructions to strike out allowances for rental' before a certain date, and to allow subsequent rentals, it was held: *That this in effect affirmed so much of the decree as allowed these second rentals; that the court below had no power to reopen* the inquiry into the accounts." Kneeland *v.* Am. Loan & T. R. Co., 136 U. S., 89, 103; 34 L. Ed., 379, 385. (Italics ours.)

In *Chaires v. United States,* 3 How., 611; 11 L. Ed., 749, it was held:

> "Where this court has affirmed the title to lands in Florida, and referred, in its decree, to a particular survey, *it would not be proper for the court below to open the case for a rehearing,* for the purpose of adopting another survey.
>
> *"The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done."*

In delivering the opinion in this case *Mr. Justice* Catron said:

> "But the duties of the court did not end here; by the 2d section of the Act of 1824 it was not only given full power and authority *to hear and determine all questions arising in the cause* relative to the validity of the title * * *.
>
> "For this purpose the petition for a rehearing was filed, seeking to have the decree of 1830 reformed, and that part of it establishing locality and boundaries set aside or disregarded, and the land located elsewhere. *This the Circuit Court of East Florida had no power to do,* on the facts set forth by the petition, *because the decree of this court, made in affirmance of that made below, is conclusive on the inferior court; and it has no authority to disturb it by the mode proposed, but can* only execute our mandate, and settle so much as remains to be done." (Italics ours.)

Respectfully submitted,

E. T. ENGLAND,
Attorney General of West Virginia;
S. B. AVIS,
WM. G. MATHEWS,
FRED O. BLUE,
Counsel for Petitioners.

[Endorsed:] In the Supreme Court of the United States. Walter S. Hallanan and E. T. England vs. United Fuel Gas Company. Brief in support of petition for writ of certiorari.

(7180)